road for the use of persons coming to his house gave permission to a building contractor, who was engaged in building on the land, to place materials on the road. The contractor placed a pile of slates on the road and left them unlighted at night. A visitor ran into them in the dark. The contractor was held liable for negligence. In *Kimber* v. *Gas Light & Coke Co.*,(3) the gas company when putting gas into a private house made a hole in the floor and failed to warn a visitor of the danger. They were held liable for the injury which resulted. There are many other cases. The cases show that the duty of care is owed to all those whom the contractor may reasonably expect to be affected by his work, whatever the capacity in which they come, whether as invitees or licencees or as other contractors.

The main question of fact to be decided in this case is whether or not the plaintiff knew of the existence of the trench at raft No. 1.

I have considered the evidence adduced by both sides very carefully. On the balance of probabilities I think the story of the plaintiff is the true story. I find that the defendant was specifically told not to commence excavating at raft No. 1 until the excavation at raft No. 2 was completed and approved by the plaintiff. I also find that the plaintiff was not aware of the trench at raft No. 1 when he visited the site on the morning of the 1st March.

The defendant after making the trench at raft No. I did not fence it. Instead of that he covered the trench with thin metal sheets and created a concealed danger unfenced and without warning. The defendant had no right to set a trap for the plaintiff whom he knew would come on the land. In my view the defendant has been negligent.

It is said that the plaintiff was negligent in walking over the metal sheets when he ought not to. How can one say that the plaintiff was negligent when he had no reason to believe that there might be danger in walking over the metal sheets?

For these reasons the plaintiff succeeds in his claim.

As a result of the accident the plaintiff sustained a fracture of the inferior ramus of the left pubic bone. He has recovered from his injury but there is residual functional impairment in the form of muscle weakness and an aggravation of pre-existing osteo-arthritis of the spine and hips and a superimposed rheumatic affection of the sciatic nerve. Taking all the circumstances into consideration I think the proper figure to award the plaintiff by way of general damages is $5,000.

Special damages has been agreed at $306.

There will be judgment for the plaintiff in the sum of $5,306 and costs.

Judgment for the plaintiff.

Solicitors: *Murphy & Dunbar; Braddell Bros.*

TOEH KEE KEONG v. TAMBUN MINING CO. LTD.

[F.C. (Barakbah L.P., Azmi C.J. (Malaya) & Ong Hock Thye F.J.) September 18, 1967]

[Ipoh — Federal Court Civil Appeal No. X. 27 of 1965]

Contract — Mining contract — Breach of — Measure of damages — Loss of business profits — Novation — Contracts (Malay States) Ordinance, 1950, ss. 63 and 74 — Evidence Ordinance, 1950, s. 92 — Best evidence.

By a series of permits and sub-leases granted by one Leong Kee Nyean who was a director of certain private companies one of which held a mining certificate the appellant came to have eventually a contractual agreement transferred from Ipoh Mining to the respondents with whom now his mining operations were to continue. This was to work a certain mining land on a cliff, which required arduous work and costly preliminary outlay before the ore could be won and earn the stipulated remuneration per ton on delivery.

After the said mining operations had progressed and begun to yield ore, so that deliveries were able to flow for some months by work of the appellant, the respondent company gave notice of halting the operations and terminating the agreement under the contract. The appellant claimed $290,000.45 which he itemised, being the value of the work done, outlay and materials used and labour and expenses.

The trial judge held that there had been a breach of contract and found the respondents' share as 10½/24¾ of the total expenditure, and gave judgment for the respondent in the sum of $99,272 and costs. On being dissatisfied with the assessment of damages, the plaintiff appealed to the Federal Court. The only issue in the appeal was whether the judgment was right as to the principle applied in the assessment of damages.

Held: (1) in considering the question of damages the yardstick could either be loss of profits or, in the alternative, compensation for capital loss and expenses rendered futile by the breach;

(2) the method of assessment adopted by the learned trial judge could not be justified either in logic or principle. It was clearly in the contemplation of the contracting parties that the appellant should not be denied the fullest opportunity to recoup all the moneys he had sunk into the enterprise. Such being the case there was no need for apportionment. There had been a novation, to which section 63 of the Contracts (Malay States) Ordinance applied;

(3) on the claim, order of the court below set aside and (a) judgment entered for $121,220 with interest thereon at 5% per annum from February 7, 1963 and (b) that an enquiry be held by the registrar as to the actual loss suffered by the appellant on item 8, and judgment for the further sum so found, with interest likewise at 5% per annum from February 7, 1963.

Cases referred to:—

(1) *Hadley* v. *Baxendale* (1854), 9 Exch. 341.

(2) *Victoria Laundry (Windsor) Ltd.* v. *Newman Industries Ltd.* [1949] 2 K.B. 528, 539.

(3) *Sally Wertheim* v. *Chicoutimi Pulp Co.* [1911] A.C. 301.

(4) *Monarch Steamship Co. Ltd.* v. *Karlshamns Oljefabriker (A/B)* [1949] A.C. 196.

(5) *Tolhurst* v. *Associated Portland Cement Manufacturers Ltd.* [1903] A.C. 414.

FEDERAL COURT.

Lim Kean Chye for the appellant.

Abdul Rahim Noor for the respondent.

Cur. Adv. Vult.

Azmi C.J. (Malaya): I have had the opportunity of reading the judgment of Mr. Justice Ong Hock Thye, and I agree with what is stated in the judgment. I would therefore allow the appeal and give judgment in favour of the appellant for the amount stated in the judgment with costs here and in the court below.

Ong Hock Thye F.J.: This appeal is raised because the appellant is dissatisfied with the amount of damages awarded him by the High Court at Ipoh in an action for breach of contract against the respondents.

The learned judge held that there had been a breach: against his judgment on this point there has been no appeal. The only issue before us, therefore, is whether the judgment is right as to the principles applied in the assessment of damages.

Section 74(1) of the Contracts (Malay States) Ordinance, 1950, is the statutory enunciation of the rule in *Hadley* v. *Baxendale.*[1] This section reads:—

"When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it."

The rule lays down the main principles as follows:—

"Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered as either arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."

In more compendious terms the rule has been restated by Asquith L.J. in *Victoria Laundry (Windsor) Ltd.* v. *Newman Industries Ltd.*[2] in a passage which I shall quote in full:—

"(1) It is well settled that the governing purpose of damages is to put the party whose rights have been violated in the same position, so far as money can do so, as if his rights had been observed: (*Sally Wertheim* v. *Chicoutimi Pulp Co.*[3]) This purpose, if relentlessly pursued, would provide him with a complete indemnity for all loss *de facto* resulting from a particular breach, however improbable, however unpredictable. This, in contract at least, is recognized as too harsh a rule. Hence,

(2) In cases of breach of contract the aggrieved party is only entitled to recover such part of the loss actually resulting as was at the time of the contract reasonably foreseeable as liable to result from the breach.

(3) What was at that time reasonably so foreseeable depends on the knowledge then possessed by the parties or, at all events, by the party who later commits the breach.

(4) For this purpose, knowledge 'possessed' is of two kinds; one imputed, the other actual. Everyone, as a reasonable person, is taken to know the 'ordinary course of things' and consequently what loss is liable to result from a breach of contract in that ordinary course. This is the subject matter of the 'first rule' in *Hadley* v. *Baxendale, supra.* But to this knowledge, which a contract-breaker is assumed to possess whether he actually possesses it or not, there may have to be added in a particular case knowledge which he actually possesses, of special circumstances outside the 'ordinary course of things,' of such a kind that a breach in those special circumstances would be liable to cause more loss. Such a case attracts the operation of the 'second rule' so as to make additional loss also recoverable.

(5) In order to make the contract-breaker liable under either rule it is not necessary that he should actually have asked himself what loss is liable to result from a breach. As has often been pointed out, parties at the time of contracting contemplate not the breach of the contract, but its performance. It sufficies that, if he had considered the question, he would as a reasonable man have concluded that the loss in question was liable to result (see certain observations of Lord du Parcq in the recent case of *Monarch Steamship Co. Ltd.* v. *Karlshamns Oljefabriker (A/B)*[4]).

(6) Nor, finally, to make a particular loss recoverable, need it be proved that upon a given state of knowledge that defendant could, as a reasonable man, foresee that a breach must necessarily result in that loss. It is enough if he could forsee it was likely so to result. It is indeed enough, to borrow from the language of Lord du Parcq in the same case, at page 158, if the loss (or some factor without which it would not have occurred) is a 'serious possibility' or a 'real danger'. For short, we have used the word 'liable' to result. Possibly the colloquialism 'on the cards' indicates the shade of meaning with some approach to accuracy."

Except for the counterclaim there is no serious dispute as to the relevant facts with which we are now concerned. By way of preface I think I should mention, for the sake of clarification, that one Leong Kee Nyean at all relevant times was and is a director of Leong Sin Nam Co. Ltd. and managing director of Leong Kee Nyean Co. Ltd. and Ipoh Mining Co. (Malaya) Ltd., all private companies.

Leong Sin Nam Co. Ltd., the holders of Mining Certificate No. 3028, having given permission to Ipoh Mining Co. Ltd. to carry on mining on their land, an agreement was made on October 15, 1960 between Ipoh Mining (for short) and the appellant, whereby the appellant was given the contract to work the cliff portion of the mining land until all tin-ore therein should be entirely exhausted. In consideration thereof the appellant was to be paid $4.80 per long ton of

ore delivered to Ipoh Mining at the foot of the cliff. After execution of this agreement, nearly two years had to be spent in arduous and costly preparatory work involving the construction of access roads and lifting of heavy machinery to the cliff top.

While such work was going on, at the appeldant's expense, pursuant to the said agreement, Leong Sin Nam Co. Ltd. granted a mining permit dated April 5, 1961 to Ipoh Mining for a period of one year, but before its expiry gave, on November 24, 1961, a sub-lease over the same mining land to Leong Kee Nyean Co. Ltd. for the period of the lease and renewals or extensions thereof. The fact that Leong Kee Nyean was a director of all of these companies, as explained earlier, accounts for their affairs being so interwoven as though these companies were one.

On November 24, 1961 Leong Kee Nyean Co. Ltd., in disregard of the appellant's rights under the existing agreement, sub-sub-leased the same land, among others, to Tambun Mining Co. Ltd., the respondents, for a tribute of $1.80 per long ton of iron ore. How Leong Kee Nyean, the managing director of both Ipoh Mining and the company bearing his name, proposed to reconcile this action with the contractual obligation of Ipoh Mining towards the appellant, he alone could tell.

On December 7, 1961 the appellant was informed by the respondents that they had been granted a sub-lease over Mining Certificate No. 3028. He was requested to stop all work on the land. A second letter to the same effect followed on December 22, 1961. As a result the appellant wrote on January 4, 1962 to Ipoh Mining that he believed the sub-lease granted to the respondents would be subject to his agreement with Ipoh Mining and reminding the company that it was its duty to see that such agreements should be respected. The final clause in that agreement had provided that the agreement "shall be binding upon the heirs, executors, administrators and assigns of the parties hereto."

After receipt of further demands to stop work on the land, the appellant, through his solicitors wrote on January 18, 1962 to the respondent. The relevant passage of the letter reads:—

> "Our clients have spent considerable sums in building an access road and generally preparing the area for excavation and just when they have got everything to the stage when mining operations could actually begin, they found these demands from you. Our clients are naturally anxious not to give up their rights under the contract which may be inspected by you, should you so desire.
>
> We are instructed that you have agreed with Mr. Leong Kee Nyean of the Ipoh Mining Company Ltd. and, also of Leong Kee Nyean Company Ltd. that our clients rights would be safeguarded.
>
> We write to enquire on what ground you now seek to stop our clients from exercising their lawful rights."

This exchange of correspondence, followed by what counsel for the respondents described as "tripartite negotiations," resulted in an agreement dated March 23, 1962 between the appellant and the respondents. A lengthy recital therein of the events leading to the agreement concluded with these words:—

> ". . . . the company has agreed to let the contractor and his partners carry on with their working of the said cliff on the same terms and conditions as contained in the said agreement of the 15th day of October 1960."

Among the agreed terms was clause 17, as follows:—

> "17. The company shall allow the contractor to continue mining operations on the said cliff until the ore is entirely exhausted and this agrement shall be deemed to have effect until the time when such iron ore shall have been completely excavated."

What, then, was the effect of this new agreement? The answer is that the appellant was restored to the same position as if the agreement of October 15, 1960 had been made with the respondents, instead of Ipoh Mining. This, in my judgment, is not open to argument. All the preparatory work done and expenses incurred became no longer futile. The appellant ceased to have any claim to damages against Ipoh Mining because Mr. Leong Kee Nyean, in the tripartite negotiations, had managed to arrange for the respondents to take over Ipoh Mining's agreement. Had the necessary preparatory work not been done earlier, it would still have had to be carried out under the second agreement, before the ore could be made available for delivery. In either case the appellant's rights were to enure till exhaustion of the iron ore contents of the cliff.

The events that took place after the new agreement may be described in the judge's own words:—

> "After the execution of the agreement the plaintiff continued with mining operations on the cliff and was able to start delivering ore only from August 1962. Monthly deliveries of ore in varying amounts were made from August up to and including the month of January 1963. Sometime in early November 1962, the plaintiff, together with other contractors, received a letter from the defendant company informing that the defendant company would be halting iron ore operations in early 1963. . . . On receiving this letter the plaintiff, through his solicitor, wrote to the defendant company, requesting that an arrangement be made for the sub-lease to be assigned to him with the approval of the superior sublessee . . . . nothing arose out of this . . . . on . . . . the 23rd January the plaintiff . . . was given two weeks' notice of termination of the agreement. . . ."

The learned judge, having held that this constituted a breach of contract — which no longer is in issue — proceeded next to consider the question of damages. The yardstick could either be loss of profits or, in the alternative, compensation for capital loss and expenses rendered futile by the breach. On this point the law is as stated in a passage in *Mayne & Mc-*

Gregor on Damages (12th Edition) para 22:—

"Sometimes however the plaintiff may be compelled by law or by circumstances to frame his suit on a different basis as to damages, not on the basis of the loss of his bargain but on the basis of his out-of-pocket loss. In other words, he is claiming not to be put into the position he would have been in had the contract been performed, but to be put into the position he would have been in had it never been made, which is a normal measure of damages akin to that in tort. In such cases expenses incurred in preparation or in part performance will be properly recoverable and will not involve an inconsistency of compensation."

In the opinion of the learned trial judge, proving the amount of profits that would have accrued from due performance of the contract involved such difficulties and uncertainty in the state of the evidence that he felt himself compelled to resort to the alternative method of assessment. With respect I agree. On this basis the appellant had claimed a sum of $290,000 being the value of work done and materials used, as to which particulars had been given as follows:—

1.	Salaries, wages, insurance, allowance etc.	$ 46,255.28
2.	Labour	48,345.51
3.	Lorry contracts	2,321.60
4.	Sundry expenses	12,526.40
5.	Consulting Engineer and Surveyor	1,635.00
6.	Repairs	9,085.10
7.	Vehicle Insurance	1,050.92
8.	Machines & Materials	112,780.64
9.	Reasonable remuneration for plaintiff's services	56,000.00
		$290,000.45

The judge disallowed only item 9, on the ground that the basis of his award should preclude recovery of "anticipated profits", but he accepted all the rest. He considered that these other figures could be accepted, and he did accept them, as reasonably true and correct, since no attempt was made at the trial to challenge them. The balance of $234,000 thus represented the appellant's actual out-of-pocket expenses held to have been incurred between October 15, 1960 and February 7, 1963. This was the aggregate period commencing with the first agreement until termination, by breach, of the second. In the judge's opinion the respondents had benefited from all the preparatory work done prior to their agreement, but:—

"Both Ipoh Mining Co. and the defendant company have by their agreements with the plaintiff caused all the work to be done and materials to be bought and used. It would be almost impossible to assess these benefits accurately in terms of dollars and cents so that liability can fairly be apportioned between Ipoh Mining Co. and the defendant company. The only reasonable approach, I think, is to ascertain the total amount of expenses incurred on the whole mining operation and apportion the share of the burden between the two companies according to the period covered by the agreement to each company."

Accordingly, the judge found the respondents' share as 10½/24¾ of the total expenditure, and gave judgment for the respondent in the sum of $99,272 and costs.

With respect, however, I do not think that this method of assessment can be justified either in logic or principle. No authority or precedent was cited, nor do I think that any can be discovered for such a course. Why was there any necessity for apportionment? Ipoh Mining had derived no benefit from the preparatory work. It is true that the managing director of Leong Kee Nyean Co. Ltd. had done an act which caused Ipoh Mining to commit a breach of its contract, but he had saved Ipoh Mining from suffering the consequences by causing the respondents to stand in the shoes of that company through their new agreement with the appellant. In the result the respondents had agreed that the appellant should be entitled to work the land until complete exhaustion of the ore therein. Thus it was clearly in the contemplation of the contracting parties that the appellant should not be denied the fullest opportunity to recoup all the moneys he had sunk into the enterprise. Such being the case, where was the need for apportionment? There had been a novation, to which section 63 of the Contracts (Malay States) Ordinance undoubtedly applies. The section reads:—

"63. If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed."

It would seem, however, that the judge had been led into a different view by the pleadings. The appellant, in his statement of claim, had pleaded that it was an implied term in the agreement of March 23, 1962 that the respondents would pay for all work done and materials used from as early as October 15, 1960. On this point the learned judge said:—

"The inclusion of the period above referred to clearly means that the defendant company would have to compensate the plaintiff for what Ipoh Mining Co. would properly have been liable if there had been a breach of contract by that company. This is a matter which one would reasonably expect to find expressly provided for in the agreement. The fact that the plaintiff was aware of it is clear from the evidence, for during the negotiation for a final text of the agreement, an attempt was made to insert certain clauses, which, if they had been agreed to by the defendant company, would extend the latter's liability to the period referred to above. The fact, however, that the defendant company did not agree to the insertion of these clauses must necessarily negative any suggestion that such an implied term can be read into the agreement. In the event the only possible conclusion is that the defendant company's liability must be confined to the period between 23rd March, 1962 up to the 7th February, 1963."

With the greatest respect I think that, in taking this view, the learned judge had fallen into serious error. In the first place there is the "best evidence" rule embodied in section 92 of the Evidence Ordinance:—

"When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 91 of this Ordinance, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from its terms:"

Hence all the evidence which the judge took into account was inadmissible and irrelevant. In the second place, whether the clause in question — which provided for $200,000 liquidated damages — was or was not inserted in the agreement did not, and could not, in the circumstances of this case, affect in any manner the assessment of damages, which is a question of law. In the third place, the "only possible conclusion", I regret to say, is a *non-sequitur* for the simple reason that there had been a novation. The effect of section 63 of the Contracts Ordinance is thus stated in 8 *Halsbury* (3rd Ed.) p. 262:—

"Novation is, in effect, a form of assignment in which, by the consent of all parties, a new contract is substituted for an existing contract. Usually, but not necessarily, a new person becomes party to the new contract, and some person who was party to the old contract is discharged from further liability. The introduction of a new party prevents the new contract from being a mere accord without satisfaction and thus affords a defence to any action upon the old contract."

An illuminating instance is to be found in *Tolhurst* v. *Associated Portland Cement Manufacturers Ltd.*,[5] of which I think I need quote only the headnote:—

"The appellant owner of chalk quarries, made a contract with the Imperial Portland Cement Company, Limited, by which it was agreed that he would for fifty years supply to the company and that the company should take and buy from him at least 750 tons of chalk per week at a certain price, and so much more (if any) as the company should require for the whole of their manufacture of Portland cement upon their land near the quarries. The Imperial Company afterwards assigned the contract and sold its undertaking, land, works, and business to the Associated Company, Limited, and went into voluntary liquidation, its affairs being wound up and its assets distributed:—

Held: (by Lords MacNaghten, Shand, and Lindley, the Earl of Halsbury L.C. doubting and Lord Robertson dissenting), that upon the true construction of the contract it must be read as if it had been expressed to be made with the Imperial Company, its successors and assigns, owners and occupiers of the work; that the Associated Company was entitled to the benefit of the contract, and could enforce it by action without joining the Imperial Company as plaintiffs."

To be entitled to its benefits, it goes without saying that the Associated Company was also subject to the contractual obligations. The same principles should apply to the present respondents.

For the reasons above-stated I would hold the respondents liable for all expenses incurred by the appellant from October 15, 1960. Items 1 to 7 come to a total of $121,220. I am, however, in some difficulty as regards items 8 and 9. As to item 8, it was claimed and accepted that $112,780.64 was spent on machinery and material. Although there was no evidence what became of them, I am sure that at least they had a second-hand or salvage value, for which the respondents should be given credit. Again, as to item 9, in lieu of the $56,000 claimed for remuneration, I think the appellant should be entitled to an award of interest on the capital moneys invested, which had proved unfruitful purely through the respondents' default.

On the claim, therefore, I would set aside the order of the court below and (a) enter judgment for $121,220 with interest thereon at 5% per annum from February 7, 1963 and (b) direct that an enquiry be held by the registrar as to the actual loss suffered by the appellant on item 8, and give judgment for the further sum so found, with interest likewise at 5% per annum from February 7, 1963.

I turn now to the respondents' counterclaim on which they were awarded $5,216.80, the exact amount claimed. This represented the difference between an advance of $25,000 received by the appellant and the value of 4,121½ dry long tons allegedly delivered by him to the respondents at the rate of $4.80 per ton, equivalent to $19,783.20. The learned judge's finding was as follows:—

"Having regard to the evidence, especially that of Mr. John Stevens (D.W.3), I have no doubt that the iron ore delivered by the plaintiff had been properly weighed and washed and that the total amount delivered from August, 1962, to January, 1963, was 6,830 tons of crude ore. This amount was arrived at after weighing had been done by the employees of the defendant company, and there is no suggestion of any error or short weighing. The plaintiff's estimate, as given by him in his reply, was nothing more than a rough estimate on his part. According to his evidence, 1,537 lorry loads of ore were delivered. He estimated the average weight of one lorry load of ore to be 6 tons. In this way, he arrived at the figure of 6,000 long tons of washed ore. If at all, this was merely a rough guess and which I am unable to accept. In these circumstances, the defendant company must succeed on the counterclaim and there will, therefore, be judgment for the amount claimed and costs."

Since the evidence of Mr. Stevens was relied on for arriving at the figure of $5,216.80, I have perused his evidence with care. He said:—

"From July onwards I obtain figures from hauliers' bills for transporting ore from the mining area to the washing plants. . . . Hauliers bills were prepared by Ng Sang Choon. . . . Total production from August 1962 to January 1963, 6,830 tons of crude ore. . . . In the vouchers of Ng Sang Choon for claims of transporting ore from the cliffs no weights were shown. The figures were based on trips at 5 tons per truck load. Yes, I look at number of trips and multiply by 5. I would not be able to say as to the accuracy of the figures. Cannot say how many tons of washed ore after drying. In my opinion about 70% of ore would be obtained after washing."

The onus of proof of the counterclaim, of course, rested on the respondent. The appellant claimed that each lorry load was 6 tons although Mr. Stevens thought it was 5 tons. There was no

evidence to suggest that the latter was right. Mr. Ng Sang Choon was not called to testify to the number of lorry loads of ore delivered. There was a wide discrepancy even between the number of lorry loads claimed on each side — the appellant said the number was 1,537; according to Mr. Stevens, 1,366. The latter, an accountant, naturally could not say how many tons of washed ore remained from raw ore after washing and drying. In his "opinion" — which can hardly count for anything, not being that of an expert or supported by any reasons — it was 70%. Why not 80? Even assuming 70% to be correct, 6,830 tons of raw ore would produce 4,781 dry tons, which is 659½ tons more than what the respondents were willing to give credit for. In short, therefore, no satisfactory evidence whatsoever was adduced to support the respondents' claim that they took delivery of only 4,121½ dry long tons and no more. The learned judge had stated that the amount of 6,830 tons was "arrived at after weighing had been done by the employees of the defendant company." In the teeth of Mr. Steven's evidence this was manifestly incorrect. Accordingly, in my judgment, the respondents failed to discharge the onus that lay on them, and their counterclaim ought to have been dismissed.

In the result, the appeal succeeds both as regards the claim and counterclaim, with costs to the appellant here and in the court below.

Barakbah L.P. concurred.

Appeal allowed.

Solicitors: *Lim Cheng Ean & Co.; Maxwell Kenion, Cowdy & Jones.*

THAM KONG v. OH HIAM & ORS.

[F.C. (Barakbah L.P., Azmi C.J. (Malaya) & Ong Hock Thye F.J.) September 18, 1967]

[K.L. — Federal Court Civil Appeal No. X. 70 of 1966]

Contract — Sale of rubber land — Sale effected pursuant to court approval — Rectification of the contract on ground of mistake — Unilateral mistake — Question of fact — Contracts (Malay States) Ordinance, 1950, s. 21 — Evidence Ordinance, 1950, ss. 91 & 92.

This was an appeal against the decision of Gill J. ([1967] 1 M.L.J. 65) setting aside the sale and transfer of a half acre of land, out of a total area of 34½ acres sold, on the ground that the transferor (since deceased), while making the sale, was under the mistaken belief that she was selling rubber land, whereas this particular piece of land contained an old plank house but no rubber trees.

By an agreement dated September 30, 1956 the 1st respondent (Oh Hiam) as administratrix of her husband's estate, contracted to sell at $450 per acre to the appellant seven pieces of land certified as rubber land. Six pieces were contiguous and situated at Gombak, one piece was in a different locality at Setapak Road on which stood an old plank house among some old rubber trees and its area was about ½ acre. Respondents 2 to 9 are joint beneficiaries in the estate with their mother the 1st respondent.

On September 23, 1957 the 1st respondent pursuant to the said agreement obtained court approval of the sale to the appellant under the Probate and Administration Enactment. Formal transfer of the seven pieces of the land was thereafter effected by her on January 20, 1958.

One of the beneficiaries, Teo Kim Choon, realized that the Setapak Road land had a house on it and was therefore, not strictly rubber land and took the view that it was sold by mistake with the other six pieces of land. The value at this time was nothing like $450 per acre due to potential building development. So overtures were made to obtain a reconveyance from the purchaser which failed. This beneficiary was the prime mover in this scheme to obtain a return to the *status quo*. On July 30, 1958, action was commenced in the name of the respondents and their mother, to have a rectification of the contract and all that had taken place to be set aside, on ground of the mistake of inclusion of the Setapak Road land in the contract. Soon after the commencement of the action the 1st respondent died, and the 2nd and 7th plaintiffs were substituted in her place after grant to them of letters of administration *de bonis non*.

The main grounds of appeal were, first, that the learned judge erred in his finding of mutual mistake, contrary to a specific plea of unilateral mistake, and secondly, that he erred in holding the respondents entitled, on the evidence, to the relief of rectification.

Held: the vendor intended to sell all seven pieces and the purchaser intended to buy the same and there was no mutual mistake or common mistake. Appeal allowed.

Cases referred to:—

(1) *Okill* v. *Whittaker* (1847), 2 Ph. 338; 41 E.R. 973.

(2) *F. E. Rose Ltd.* v. *Wm. H. Pim Ltd.* [1953] 2 All E.R. 739.

(3) *Blay* v. *Pollard & Morris* [1930] 1 K.B. 628, 634.

(4) *Esso Petroleum Co. Ltd.* v. *Southport Corporation* [1956] 2 W.L.R. 81, 90-91.

(5) *Tamplin* v. *James* (1880), 15 Ch. D. 215, 217, 221.

(6) *Hasham* v. *Zenab* [1960] 2 W.L.R. 374, 381.

(7) *Chin Keow* v. *Government of Malaysia* [1967] 2 M.L.J. 45.

(8) *Yuill* v. *Yuill* [1945] P. 15, 19.

(9) *Watt* or *Thomas* v. *Thomas* [1947] A.C. 484.

(10) *Norwich Union Fire Insurance Society* v. *William H. Price Ltd.* [1934] A.C. 455, 463.

FEDERAL COURT.

K. K. Lam for the appellant.

S. D. K. Peddie for the respondents.

Cur. Adv. Vult.

Barakbah L.P.: By an agreement dated 30th September, 1956 (Exhibit D.6), the first respondent, the administratrix of the estate of Teo Teow Guan, deceased, agreed to sell to the appellant seven pieces of land held under E.M.R. Nos. 4139, 4140, 5339, 4219, 4076, 5634 and 5633 in the Mukim of Setapak for Lots Nos. 2663,